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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURICE MOORE,

Defendant and Appellant.

2d Crim. No. B262856
(Super. Ct. No. BA406906-01)
(Los Angeles County)

Maurice Moore appeals a judgment following conviction of robbery (two counts), with findings that he personally used a firearm during commission of the crimes, committed the crimes to benefit a criminal street gang, and suffered a prior serious felony strike conviction. (Pen. Code,

§§ 211, 12022.53, subd. (b), 186.22, subd. (b)(1)(C), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).¹ We affirm.

FACTUAL AND PROCEDURAL HISTORY

In the morning of December 28, 2012, 15-year-old A.T. and 15-year-old K.S. were walking a red and blue minibike, which belonged to 14-year-old Q.E., on the sidewalk on Buckingham Avenue in Los Angeles. The boys had arranged to meet Q.E. at the train station.

As the boys walked the minibike, a white Suburban vehicle stopped near them. Moore left the vehicle, approached the boys, and stated: “Who is these Niggas in my hood, cuz?” A.T. responded that he didn’t “bang.” Moore demanded the minibike and A.T. refused. When A.T. saw the hammer of a handgun in Moore’s waistband, however, he surrendered the minibike. A.T. testified that Moore “put his hands down,” Moore’s “shirt [came] up,” and A.T. saw the hammer of the firearm. As Moore took the minibike, he stated: “Tell whoever or wherever you from the West Boulevards did it.” The driver of the Suburban vehicle then followed Moore as he walked away with the minibike.

Q.E. was behind a nearby vehicle and witnessed the robbery. At trial, he testified that he saw Moore remove the

¹ All statutory references are to the Penal Code unless otherwise stated.

firearm from his waistband and point it at A.T. Q.E. stated that he knew that the Buckingham Avenue neighborhood was claimed by the “Crips” criminal street gang.

A.T. telephoned for police assistance and reported the robbery. Approximately one and one-half hours later, A.T. and Q.E. saw Moore riding the minibike in the neighborhood. A.T. telephoned the police again and reported the sighting.

During a later police interview, Moore admitted that he belonged to the West Boulevard Crips. He also stated that he had been riding a red and blue minibike in the neighborhood. The police interview was a ruse in the guise of investigating a bank robbery.

A.T. and Q.E. identified Moore in a photographic lineup and later at trial. Los Angeles Police Detective David Acee prepared the photographic lineup by submitting Moore’s photograph to a computer software program that then selected similar photographs regarding gender, ethnicity, relative age, height, and weight. The boys identified Moore in part due to a distinctive scar on the right side of his face. A.T. testified that he was “positive” that the robber was Moore, and Q.E. testified that he had a “good look” at the right side of the robber’s face.

Los Angeles Police Detective Mark Horta, a gang expert for the Southwest Division Gang Enforcement Detail, testified that he had been assigned to street gang detail,

including the “West Boulevard Crips” gang, for six years. Horta stated that the primary activities of the West Boulevard Crips included attempted murders, shootings, street robberies, possession of narcotics for sale, possession of firearms, burglaries, making criminal threats, and witness intimidation. Horta knew Moore to be a member of the West Boulevard Crips, based upon Moore’s admissions and gang-related tattoo.

Horta testified to two predicate criminal convictions of members of the West Boulevard Crips. Horta knew the defendants in the two prior criminal prosecutions and had testified at their trials, either as the arresting and investigating officer or as the gang expert. Based upon a hypothetical drawn from the circumstances in this prosecution, Horta opined that Moore committed the minibike robbery to benefit the West Boulevard Crips.

Moore presented the expert opinion of Doctor Mitchell Eisen regarding the unreliability of eyewitness identification. Eisen opined that the photographs in the photographic lineup were dissimilar concerning age of the suspects and their skin color.

Defense counsel agreed not to question Q.E. regarding a pending juvenile case in which Q.E. was charged with robbery. This was in exchange for Q.E. not invoking his Fifth Amendment right against self-incrimination. Defense

counsel wanted, however, to examine Q.E. regarding his gang affiliation. The trial court ruled that if the defense presented any evidence of Q.E.'s gang involvement, it would allow Q.E. to invoke his Fifth Amendment right against self-incrimination and find him unavailable to testify.

The jury convicted Moore of two counts of robbery. (§ 211.) It also found that he personally used a firearm during commission of the offenses and that he committed them for the benefit of a criminal street gang. (§§ 12022.53, subd. (b), 186.22, subd. (b)(1)(C).) In a separate proceeding, Moore admitted suffering the prior serious felony strike conviction. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

The trial court sentenced Moore to a prison term of 24 years, consisting of a doubled two-year term for the robbery counts, 10 years for the firearm enhancement, and 10 years for the criminal street gang enhancement. The court ordered that sentence for the second robbery count be served concurrently to the sentence for the first robbery count. The court also imposed a \$300 restitution fine and a \$300 parole revocation restitution fine (suspended), and awarded Moore 928 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45.)

Moore appeals and contends that he was denied his constitutional right to confront witnesses by Q.E.'s exercise of his Fifth Amendment privilege against self-incrimination.

DISCUSSION

Moore argues that the trial court denied his Sixth Amendment right to confront witnesses by ruling that the court would permit Q.E. to exercise his Fifth Amendment privilege not to testify regarding a pending juvenile matter and his involvement with a criminal street gang. Moore asserts that he was entitled to cross-examine Q.E. regarding his gang affiliation as a means of impeaching his credibility. Moore adds that during an in-limine hearing, Q.E. denied involvement with a gang (“I don't like gang-bangers. That's not me.”).

Moore claims the error is prejudicial beyond a reasonable doubt because his primary defense was mistaken identity motivated by the victims' plan to blame a rival gang member for the minibike theft.

Prior to trial, defense counsel stipulated that she would not question Q.E. regarding his pending robbery charges in juvenile court. Q.E.'s counsel informed the trial court that he would advise Q.E. to exercise his Fifth Amendment privilege regarding the pending juvenile matter but not “with regard to this case.” During trial, defense counsel informed the court that she intended to question Q.E. regarding his gang affiliation and Facebook photographs of him flashing gang signs; Q.E.'s counsel stated that Q.E. would plead the Fifth Amendment and not testify regarding any gang involvement. In response, the trial

judge stated: “The court believed and believes that [Q.E.] has a Fifth Amendment privilege not to testify about his gang affiliation because it might directly impact the open case; and, therefore, if [Moore] had wanted to go into that, then the court was prepared to sustain a claim of privilege and not let him testify at all. And, therefore, you [defense counsel] are saying, that it was a tactical decision on your part to have him testify in front of the jury so they could see him as opposed to having his testimony read to the jury so they could not see him, correct?” Defense counsel replied, “That's correct.” Q.E. thus testified at trial but not regarding his pending juvenile matter or his criminal street gang associations.

A witness is unavailable to testify within the meaning of Evidence Code section 240, subdivision (a)(1) if he is entitled to invoke his privilege against self-incrimination. (*People v. Williams* (2008) 43 Cal.4th 584, 613 [scope of fundamental principle that a witness may not be compelled to incriminate himself is liberally construed].) The privilege is properly invoked when the witness's answers would provide a link in the chain of evidence required to prosecute the witness for a criminal offense. (*Id.* at pp. 613-614.) On review, we independently review the question whether the trial court properly permitted Q.E. to invoke his privilege against self-incrimination. (*Id.* at p. 614.)

For several reasons, the trial court did not err by permitting Q.E. to invoke his privilege. Defense counsel stipulated that she would not ask Q.E. “any questions about his pending robbery case.” Following an in-limine hearing, the court found that Q.E.’s Fifth Amendment privilege extended to any gang affiliation. Moore may not now complain. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251 [defendant may not complain of determination that witness was unavailable where defendant conceded issue in trial court], disapproved on other grounds by *People v. Edwards* (1991) 54 Cal.3d 787, 835.) Moreover, defense counsel explained that her stipulation was a tactical decision to obtain Q.E.’s live testimony at trial.

In any event, the trial court properly determined that Q.E. was unavailable as a witness regarding his pending juvenile matter and gang affiliation. Q.E.’s counsel stated that he advised Q.E. to invoke the privilege regarding his pending juvenile proceeding *and* his gang affiliation. To deny an assertion of the privilege, the court must be perfectly clear that the witness is mistaken and the witness’s answers cannot possibly have a tendency to incriminate. (*People v. Williams, supra*, 43 Cal.4th 584, 614.)

On appeal, Moore argues that Q.E. waived the privilege by stating during an in-limine hearing that he disliked “gang-bangers.” We disagree. The failure to invoke the privilege

against self-incrimination during one hearing within a proceeding does not necessarily constitute a waiver for the purpose of subsequent hearings. (*People v. Williams, supra*, 43 Cal.4th 584, 615; *People v. Lawrence* (1959) 168 Cal.App.2d 510, 517 [incriminating admission at in-limine hearing ordinarily does not prevent witness from invoking the privilege regarding the matter at trial].) Given the broad protective scope of the privilege, waiver of a nonparty witness's privilege is not to be lightly inferred. (*Williams*, at p. 614.) Here, the in-limine hearing occurred outside the jury's presence and concerned whether Q.E. would testify regarding his involvement, if any, with a criminal street gang. Q.E.'s counsel informed the trial court that Q.E. would invoke the privilege regarding this issue.

Finally, error, if any, is harmless pursuant to any standard of review. A.T. and Q.E. identified Moore in part based upon his distinctive facial scar. During a police interview, Moore admitted that he had been riding a red and blue minibike in the neighborhood. Moore was also a known member of the West Boulevard Crips street gang based upon his admissions and tattoos. "[A] distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified

on direct examination.” (*United States v. Cardillo* (2d Cir. 1963)
316 F.2d 606, 611.)

The judgment is affirmed.

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GILBERT, P .J.

We concur:

PERREN, J.

TANGEMAN, J.

Frederick N. Wapner, Judge
Superior Court County of Los Angeles

Lisa Holder, under appointment by the Court of
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